

No. 10,525

IN THE <sup>6</sup>  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

---

CHAN CHAUN,

vs.

UNITED STATES OF AMERICA,

*Appellant,*

*Appellee.*

---

**APPELLANT'S OPENING BRIEF.**

---

WALTER H. DUANE,

Mills Building, San Francisco 4, California,

JAMES B. O'CONNOR,

Balfour Building, San Francisco 4, California,

*Attorneys for Appellant.*

**FILED**

MAR 29 1944

PAUL P. O'BRIEN,  
CLERK



## Subject Index

---

	Page
Jurisdiction .....	1
Statement of Case .....	1
A Summary of the Evidence.....	5
Specifications of Errors Relied Upon.....	18
The court erred in denying appellant's motion for a directed verdict and in overruling his motion in arrest of judgment	18
Conclusion .....	22

---

## Table of Authorities Cited

---

Cases	Pages
Ching Wan v. United States, 35 Fed. (2d) 665 (Ninth Circuit) .....	20
Hammond v. United States, 127 Fed. (2d) 752.....	21
Jehl v. United States, 127 Fed. (2d) 585.....	22
McClintock v. U. S., 60 Fed. (2d) 839.....	19
Parnell v. United States, 64 Fed. (2d) 324.....	21
Romano v. United States, 9 Fed. (2d) 522.....	21
United States v. Fullerton, Fed. Case No. 15,176, 6 Blanctf 177 .....	22

## Codes and Statutes

Judicial Code as amended by the Act of February 15, 1925, Section 128 (A) (28 U. S. C. A. Sec. 225).....	1
U. S. C. A., Title 21, Section 174.....	1, 2



IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

---

CHAN CHAUN,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

**APPELLANT'S OPENING BRIEF.**

---

**JURISDICTION.**

The trial court had jurisdiction under two indictments charging violations of Section 174, Title 21, U. S. C. A., in various counts.

This court has jurisdiction under Section 128 (A) of the Judicial Code as amended by the Act of February 15, 1925. (28 U. S. C. A. Sec. 225.)

---

**STATEMENT OF CASE.**

Chan Chaun, the appellant, was indicted by the grand jury for the Northern District of California, Southern Division, on the 3rd day of February, 1943. He was also indicted by the grand jury for the North-

ern District of California, Northern Division, on the 22nd day of March, 1943.

The indictment returned in the Northern Division was consolidated for trial with the indictment returned in the Southern Division.

The indictment returned in the Northern Division charged the defendant in one count with having unlawfully, knowingly, fraudulently and feloniously concealed and facilitated the concealment of 80 ounces of smoking opium.

The indictment in the Southern Division charged the defendant in four separate counts with violations of Section 174, Title 21, U. S. C. A., having to do with the concealment of opium and yen shee. Counts one and two of the indictment returned in the Southern Division were dismissed prior to the trial.

The subject matter of both the indictment in the Northern Division and in the Southern Division were the same. The facts out of which the alleged violation arose was the transportation of the narcotics in question through the Northern Division and into the Southern Division of the District.

The indictment returned in the Northern Division specifically charged that the defendant, on the 1st day of December, 1942, at Davis Junction in the County of Yolo, within the Northern Division, unlawfully, knowingly, fraudulently and feloniously concealed and facilitated the concealment of a certain derivative and preparation of opium, namely, smoking opium, in quantity particularly described

as approximately 80 ounces of smoking opium contained in 12 five-tael brass cans in a suit case in a bus of the Pacific Greyhound Bus Company, which opium had been imported contrary to law.

The indictment returned in the Southern Division charged that the defendant, in the third count, did conceal and facilitated the concealment of a lot of smoking opium, in quantity particularly described as three jars containing approximately one ounce and 180 grains of smoking opium, which had been imported contrary to law, and, in the fourth count with having concealed and facilitated the concealment of a certain quantity of a derivative of smoking opium, namely, a lot of yen shee in quantity particularly described as 220 grains of yen shee, which had been imported contrary to law.

To the two indictments in question the defendant entered a plea of not guilty.

The appellant was convicted by a verdict of a jury on August 5, 1943. The appellant was found guilty on counts three and four of the indictment returned in the Southern Division and was found guilty of the offense charged in the indictment returned in the Northern Division. (Tr. R. pp. 7, 83.)

The appellant was sentenced by the trial court as follows:

On counts three and four of the indictment returned in the Southern Division, the appellant was sentenced to serve a year and a day in a United States penitentiary and pay a fine of \$100.00 on each

count, said terms of imprisonment to run concurrently, and the sentence on said indictment to run concurrently with the sentence imposed on the indictment returned in the Northern Division, and that defendant be further imprisoned for the payment of the fine, or otherwise discharged as by law provided.

On the indictment returned in the Northern Division, on which the defendant was convicted, he was sentenced to a term of two years in a United States penitentiary to be designated by the Attorney General and to pay a fine in the sum of \$500.00 and be further imprisoned for the payment of said fine until otherwise discharged, as provided by law.

The defendant was sentenced to serve a total term of two years in a penitentiary and to pay a total fine in the sum of \$700.00. (Tr. R. pp. 13, 14, 15, 86, 87, 88.)

Appellant moved the trial court for a directed verdict of not guilty at the conclusion of the Government's case, which motion was denied. (Tr. R. pp. 58, 59, 60, 61, 62, 63, 64.)

Appellant moved the trial court for a new trial upon various grounds, amongst which were that the evidence was insufficient, as a matter of law, to sustain the verdict and that the trial court should have directed a verdict of not guilty. (Tr. R. pp. 11, 12, 85, 86.)

Appellant moved the court in arrest of judgment upon various grounds, including that the evidence

was insufficient to support the verdicts and that the evidence was contrary to law as to each of the counts upon which appellant was convicted. (Tr. R. pp. 10, 11, 84, 85.)

The assignment of errors of appellant was filed within the time set by the trial court. (Tr. R. pp. 76, 77, 78.) The bill of exceptions was settled and allowed by the trial court within the time fixed by the trial court and as enlarged by the order of this court. (Tr. R. pp. 20, 78, 79.)

---

#### **A SUMMARY OF THE EVIDENCE.**

On the 1st day of December, 1942, agents of the Narcotic Bureau of the Department of Internal Revenue had the Greyhound Bus Depot at Davis, California under observation. They discovered in the baggage compartment of a bus a suitcase containing 12 brass five tael tins of smoking opium. They removed the opium from the suitcase and then had the suitcase brought by the Greyhound Bus to its destination, the Pacific Greyhound Bus Depot on Fifth and Mission Streets in the City and County of San Francisco. The suitcase was placed in the baggage department at the Greyhound Bus Depot. The narcotic agents kept the suitcase in the baggage room of the depot under observation and on the morning of December 9th Timothy Leong called at the bus depot and presented a check tag calling for the delivery of the suitcase the narcotic agents had been holding un-

der their observation. Thereafter, under the direction of the narcotic agents, Timothy Leong, who was a truck driver, delivered the suitcase to the Hing Wah Tai Company located at 717 Grant Avenue in San Francisco. There the narcotic agents observed the delivery of the suitcase to the premises at 717 Grant Avenue. They entered the premises after the delivery of the suitcase and, according to their testimony, after a thorough search and investigation of the premises found therein three jars containing one ounce and 184 grains of smoking opium and a quantity of yen shee. At the time the agents searched the premises at 717 Grant Avenue they found a number of Chinese persons, amongst whom was the appellant, Chan Chaun.

The appellant, Chan Chaun, was indicted by the Grand Jury at Sacramento and charged with the illegal concealment of the 12 five tael tins of opium removed from the Greyhound bus at Davis Junction. He was also indicted in San Francisco for the concealment of the opium and yen shee, alleged to have been found by the officers at 717 Grant Avenue.

The Government chemist identified the various objects found on the bus and at the premises at 717 Grant Avenue as opium and yen shee.

Dwyer H. Skemp, an inspector for the State Department of Agriculture, testified that while inspecting the baggage compartment of the Greyhound bus at Davis on December 1st at about 8:30 A. M. he found therein a black suitcase containing the 12 five tael tins of opium. The opium was in a bag that

contained an Oregon newspaper and a Chinese newspaper. There was attached to the suitcase a baggage tag numbered 9-37-21.

Timothy Leong, a truck driver for the Canton Express Company, testified that on the 9th of December he went to the Pacific Greyhound Bus Depot at San Francisco for the purpose of presenting a claims check and picking up whatever the claims check called for, but upon arriving at the bus depot he presented the claims check and thereupon he was interviewed by the Federal Narcotic Agents and searched. Thereafter he was taken to the Federal Building and questioned. There he saw the suitcase in question. Thereafter, in company with the narcotic agents, he went to 717 Grant Avenue and delivered the suitcase. The baggage check that he presented to the Pacific Greyhound Bus Company people was one he had received from his boss. He was employed by the Canton Express Company. He delivered the suitcase to the Hing Wah Tai Company at 717 Grant Avenue.

Frank Dun testified that he was the owner of the Canton Express Company and that Timothy Leong was one of his drivers; that on the 9th of December he directed Leong to pick up a piece of baggage from the Pacific Greyhound Bus Depot and gave him a baggage tag for that purpose. He identified the tag as one that had been given him by Pon Wai, who was one of the partners of the Hing Wai Tai Company.

Pon Wai testified that he was shipper and receiver for the Hing Wai Tai Company, which company was in the importing and exporting business. That on De-

ember 9, 1942 he delivered to Dun of the Canton Express Company the baggage check and directed Dun to pick up the baggage called for by the check and bring it to the Hing Wai Tai Company. The baggage that was brought to the Hing Wai Tai Company was a black suitcase. He testified that Mr. Chaun, the appellant, told him to take the baggage check down to the express company and pick up the baggage. He said he was one of the owners of the Hing Wai Tai Company; that there were six or seven owners, including himself and Chan Chaun; that the company employed one or two other people; that he remembered testifying before the United States Commissioner at the preliminary hearing of Chan Chaun, the appellant, at which time he stated he did not know who put the tag on the desk at the Hing Wai Tai Company, but at the time Chan Chaun told him to have the baggage picked up some strangers, whom the witness did not know, were standing by.

Leonard G. Titus, testified that he was an employee of the Pacific Greyhound Bus Company, and that he was in charge of the baggage department at the depot. From his records he identified the baggage check as one belonging to his company and that the records disclosed that the baggage was checked at Portland on November 20, 1942 at the Union Terminal. He further testified that when baggage is checked, each piece must conform to the number of the tag and that a separate tag is given for each piece. He testified that you could not check baggage on a Pacific Greyhound bus without being a passenger and that you

must present a ticket at the time of checking the baggage.

Thomas C. McGuire testified that he was a federal narcotic agent and that on the 9th of December, 1942, at about 9:30 in the morning, he, with another narcotic inspector, went to the Pacific Greyhound Depot in San Francisco and witnessed the arrival of Timothy Leong and the presentation by him of the baggage tag and the subsequent delivery by Leong of the suitcase at 717 Grant Avenue. That he, in company with other narcotic agents and police officers, entered the premises at 717 Grant Avenue; while there he refused exit to Chinese customers who were in the premises; that while there he spoke to Pon Wai; that thereafter Pon Wai went upstairs to the fourth floor with Inspector Manion of the San Francisco Police Department; that Narcotic Supervisor, Manning, and Inspector Manion, in the presence of the witness, questioned Pon Wai; that thereafter Pon Wai was taken before appellant, Chan Chaun, while Chan Chaun was being questioned in a small cubbyhole on the top floor of the building; that he, the witness, heard Pon Wai state he had received the express tag from the appellant; that upon receiving instructions from Manning he remained with Pon Wai some twenty or twenty-five feet from where appellant was and he observed the elevator in motion; that he walked in the direction of the elevator and observed a home made shelf arrangement from which he removed three white porcelain jars, which he said were of the type used to contain opium; that these jars had been

freshly washed and were in clear view; that he observed another jar on the lower shelf which contained traces which appeared to be opium; that he took these jars to his superior, Major Manning and thereafter continued his search and found implements used for pipe smoking yen shee in proximity to where he found the freshly washed jars. He said that he saw yen shee in the possession of Inspector Connolly, which he believed had been found on the premises. He said they also found a number of opium pipes that were concealed in different places. He testified that a cook, Pon Jeung, was later questioned on the premises in the presence of the officers and the appellant and at that time the cook said that the opium had not belonged to him but that it belonged to the appellant. He further testified that later both the cook, Pon Jeung, and the appellant, Chan Chaun, were arrested.

John Connolly testified that he was a police officer of the San Francisco Police Department. That on December 9, 1942, he was present at the premises of the Hing Wai Tai Company at 717 Grant Avenue and that he went there accompanied by the other officers and was instructed by his superior, Inspector Manion, to go to the top floor; that he started a search and in the kitchen in the rear on the top floor Agent McGuire found jars of opium and opium pipes, which the witness identified.

John J. Manion testified that he was an inspector in the San Francisco Police Department in charge of the Chinatown Squad; that on December 9, 1942,

he went to the premises at 717 Grant Avenue and that Supervising Agent Manning and he went to the top floor of the building and there had a conversation with the appellant, Chan Chaun; that the appellant, Chan Chaun, was advised by Major Manning when he came into the small room he occupied that he was under arrest. He testified that the room contained clothes, bed, table and considerable Chinese reading material and books. He said there were several conversations with appellant on that day and that some of the officers who were present were outside the room door; that Pon Wai was brought before the appellant; that he, the witness, knew Pon Wai was a partner and that appellant was a partner in the establishment; that at the time Pon Wai was in the presence of the appellant he said the appellant had given him the tag to give to the express man and that at that time the appellant said that he, the appellant, had gotten the tag from a man by the name of Wong in the Bing Tong Building; that appellant said that at the time he did not know where Wong lived. There were further conversations. Pon Jeung's attention was called to the opium pipes and bowls that were found in the kitchen part of the loft and Pon Jeung said they belonged to the appellant and were not his, but appellant neither denied nor affirmed this. Later an interpreter, a Miss Fong, was brought in and there was a further conversation. Appellant was then questioned in English and replied in English. All of the first conversation testified to was in English. Appellant was asked whether he had been out of town

and he said he had been in Vancouver, Seattle and Portland. He said he had stayed at the Portland Hotel in Portland on the 29th of November. The witness described the premises at 717 Grant Avenue as a three story building, the second story of which was sort of a mezzanine floor with two floors above; that the floor had a width of 25 feet and a depth of 50 feet; that the room which appellant occupied was at the front of the building on the Grant Avenue frontage and that the kitchen he referred to was at the extreme rear; that the room occupied by appellant was partitioned off at the front of the building. He did not recall whether, when appellant was questioned concerning the check, the check was shown to him. He did not recall asking appellant where he got the check, but he did recall that appellant said he got it from a man by the name of Wong. Appellant made this statement after he had been confronted by Pon Wai. Appellant said he had met Wong the day before in the Bing Tong Building. The witness did not recall whether Pon Wai told him that there had been strange men in the place when he got the ticket, nor did he recall that Pon Wai had told him that he found the ticket on the desk.

Joseph A. Manning testified that he was the District Supervisor for the Bureau of Narcotics and that he went to the Hing Wai Tai Company on December 9th. That while there he had several conversations with the defendant, at which Inspector Manion was present and agents Cass and McGuire participated in some of the conversations; that during one of these

conversations Pon Wai was brought into the room occupied by Chan Chaun and there said, in the presence of Chan Chaun, that he had obtained the baggage check in question from Chan Chaun; that at this conversation Chan Chaun claimed that Pon Wai got the check from another man, but Pon Wai insisted that he had gotten it from Chan Chaun. During another conversation at that time Chan Chaun said that he had been in Vancouver, Seattle and Portland and that he was in Portland on November 29th and 30th and had stopped at the Portland Hotel; he denied that he had come down by bus and stated that he returned to San Francisco by train. On one occasion during these conversations Pon Yin Jeung was brought into the room where Chan Chaun had been sleeping and Pon Jeung said the jar he had in his hand and the opium smoking paraphernalia belonged to Chan Chaun; Chan Chaun did not respond to this statement. This was in English, an interpreter not being present. We verified that he had stopped at a hotel in Vancouver but had no record that he had stopped in Portland at the Portland Hotel. This check was made by the Portland office.

C. T. Cass testified that he was a Government narcotic inspector. That on the afternoon of December 1st, at Davis Junction in Yolo County, a bag containing narcotics was turned over to him by the driver of a Pacific Greyhound bus; that that bag had a check on it marked 9-37-21; that he, Cass, removed from the bag 12 brass, five tael tins, containing opium; the tins were wrapped in a copy of Life, a copy of Look,

some Oregon papers and a Chinese newspaper. He, Cass, observed the Greyhound bus depot in San Francisco on December 9th, with other agents, and saw Timothy Leong arrive at the baggage office of the bus station; he later saw Leong deliver the suitcase to 717 Grant Avenue; Leong left the suitcase inside the door of the premises at 717 Grant Avenue; at that time there were several persons in the premises. He, Cass, was present at a conversation between Pon Wai and the defendant, at which time Pon Wai said that he had received the baggage check from Chan Chaun, which Chan Chaun denied, and stated that Pon Wai had gotten the check from another person, but Pon Wai stated: "No, you possibly might have taken it from him, or something like that, but you are the one that gave it to me". Pon Wai said, "No, there was another man there, but you gave me the check". As I recall, Chan Chaun said that a Wong man gave it to him.

Pon Yin Jeung testified that he worked for the Hing Wai Tai Company at 717 Grant Avenue and had worked there for four or five years; he did not speak English; he was present on December 9th at the Hing Wai Tai Company; he denied that he was asked in English whether certain opium which was found there belonged to him and denied that he stated that it belonged to Chan Chaun; that he told the narcotic agents to ask Chan Chaun to whom it belonged.

Lee King, called as a witness by the defendant, testified that he lived at 717 Grant Avenue and was living there on the 9th of December and was a Chi-

nese bookkeeper for the company. He testified that he was one of the owners of the company and occupied a room at 717 Grant Avenue and knew Chan Chaun. He testified that on the 8th day of December he was present when Chan Chaun was talking to a Wong man; this man asked the price of merchandise; this man stated he wanted a piece of baggage brought in and Chan Chaun told him he would have the baggage picked up for him; that he, the witness, did not see the baggage tag put down. He testified that when a customer asks that baggage be picked up, it was the practice of the company to do this as an accommodation. He further testified that he took his meals at 717 Grant Avenue and several other people did. He further testified that Chan Chaun, the cook, the porter and himself lived there and had access to the kitchen. He further testified that the company was engaged in the exporting and importing of Chinese goods.

Pon Yin Jeung testified, as a witness for the defendant, that he was the cook at 717 Grant Avenue and that several of the people employed there had access to and used the kitchen; he said that himself, Chan Chaun, Lee King and Mah Hoy lived at 717 Grant Avenue.

Pon Wai testified, on behalf of the defendant, that he did not live at 717 Grant Avenue, but he took his meals there and that he had occasion to go into the kitchen located on the fourth floor on many occasions.

Chan Chaun testified, as a witness on his own behalf, that he was fifty-five years of age, married and

the father of three children; that he was a member of the firm of Hing Wai Tai Company and had been such for four years; that he lived at 717 Grant Avenue; that he had occasion to go to Vancouver on November 30th and on his way stopped at Portland. He testified that he left San Francisco October 29th and that his first stop was in Portland. (The witness mentioned the date he was in Portland as being November 30th and October 30th.) That he left San Francisco the night before and the next day arrived in Portland where he stayed one day; that while there he visited some of his customers; that he then went to Seattle where he stayed three or four days and visited his trade; that while in Seattle he visited the Chinese consul for the purpose of arranging his visit to Vancouver; that he received from the Chinese consul at Seattle a letter dated November 2, 1942, which letter he took with him to Vancouver and which letter was admitted in evidence; that he was in Vancouver on either the 3rd or 4th of November and that his purpose for going there was to purchase goods; that while there he dealt with a customs broker whose name he did not remember; that this customs broker had been recommended to him by Mr. Hooper, a customs broker in San Francisco. He stated that he was not in Portland on November 30th. He denied that Government's Exhibit No. 7, the suitcase in question, was his; he denied that he checked Government's Exhibit No. 7, the suitcase, in Portland and denied that he had ever seen it before. He stated that on December 7th he saw the bag that Major Manning brought to 717 Grant Avenue. He stated that

a baggage check was given to him by a customer by the name of Wong Jock Mong, who asked him to have the baggage picked up for him as an accommodation; that Wong left the check on the desk and that he, Chan Chaun, told Pon Wai to have the baggage picked up; that he was not told, nor did he know what the suitcase contained. He was just requested to have it picked up. He had met Wong the night before at the Ting Hong Tong and he, Wong, had told him that he, Wong, had come from Portland to buy goods. He testified that he, Chan Chaun, and Wong were both members of the same Tong. He denied that Government's Exhibits 1, 2 and 3 were his or that he had ever had them in his possession, or had ever seen them in the kitchen at 717 Grant Avenue, or any other place. He also made this same denial with respect to Exhibits 4, 5 and 10, which exhibits constituted the opium pipes, scales and jars. He also denied he had ever seen the 12 brass tins containing opium that were seized on the bus at Davis. He admitted that he had been in San Quentin on a charge of opium smoking.

The above summary of the evidence is somewhat lengthy but we believe necessarily so, because of the fact that the sole question on this appeal is the sufficiency of the evidence to sustain the verdict.

**SPECIFICATIONS OF ERRORS RELIED UPON.****THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR  
A DIRECTED VERDICT AND IN OVERRULING HIS MOTION  
IN ARREST OF JUDGMENT.**

The assignment of errors contained in assignments I and III may be treated under one heading, since they both relate to the sufficiency of the evidence to sustain the verdict and to the question of whether or not, as a matter of law, the trial court should have directed the jury to return a verdict of not guilty on both indictments. The same question is involved with respect to the overruling by the court of appellant's motion in arrest of judgment, challenging the sufficiency of the evidence to support the verdict.

We believe that the entire evidence upon which the Government must rely to sustain the conviction of appellant may be summed up as follows:

(A) The delivery of the baggage check by appellant to a member of the Hing Wai Tai Company for the purpose of having the baggage represented by said check picked up;

(B) The finding of yen shee and smoking paraphernalia in the premises at 717 Grant Avenue, which were jointly occupied by several persons, including appellant.

The indictment returned in the Northern Division of the Northern District charged a violation of the Jones-Miller Act with respect to the 12 tins of opium found on the Greyhound bus at Davis, California.

The indictment returned in the Southern Division of the Northern District charged in two counts the possession of smoking opium and yen shee at the

premises known as 717 Grant Avenue, San Francisco, California.

There is no evidence in any manner, shape or form connecting appellant with the 12 tins of opium found on the Greyhound bus at Davis, except the delivery by appellant several days after the finding of this opium, of a baggage check to the witness Pon Wai.

There is a total lack of evidence to connect appellant with the possession of the smoking opium and yen shee found at 717 Grant Avenue and the subject matter of the indictment returned in the Southern Division of the Northern District, except the fact that it was found in a place to which appellant and several other Chinese had access and an alleged accusation by the cook, Pon Yin Jeung, at the time of the arrest of appellant and Pon Yin Jeung, that the opium belonged to appellant, which accusation was denied on the witness stand by Pon Yin Jeung, who was called as a Government witness.

The evidence with respect to both indictments attempting to connect appellant with the offenses charged against him consists solely of suspicious circumstances indicating that appellant had the opportunity to have possession of the narcotics charged in both indictments.

The evidence viewed in its entirety and in a light most favorable to the prosecution is as consistent with the innocence of appellant as with his guilt and under such circumstances the verdict should have been directed in favor of appellant.

*McClintock v. U. S.*, 60 Fed. (2d) 839.

In the case of *Ching Wan v. United States*, 35 Fed. (2d) 665 (Ninth Circuit), the appellant, Ching Wan, was shown to have transported, with the help of another person, a box containing opium to an express company for the purpose of having said box put in transit for delivery to another person. In that case this Circuit reversed the conviction of Ching Wan and held the evidence insufficient to sustain his conviction, because there was a lack of evidence to show any knowledge on the part of Ching Wan of the contents of the package.

We submit that as far as the facts are concerned, the evidence attempting to connect the appellant in this case with the contents of the suitcase represented by the baggage check is not as strong as the evidence in the *Ching Wan* case and there is an entire lack of evidence showing knowledge on the part of the appellant of the contents of said suitcase or in any manner connecting him with the suitcase or its contents.

The facts surrounding the presence of opium and yen shee at the premises known as 717 Grant Avenue in San Francisco are as consistent with the innocence of appellant as with his guilt. An examination of the record will show that the premises in question was a Chinese importing and exporting concern; that several persons lived there and had their meals there; that the place where the alleged opium and yen shee were found was accessible to all of the persons living and eating on the premises; that they were no more accessible to appellant than they were to any one of several others who had free and open access to the premises.

The only scintilla of evidence tending to connect appellant with possession of the opium and yen shee at 717 Grant Avenue is the alleged statement by the Chinese cook to the officers, that the opium and yen shee belonged to the appellant. This statement was testified to by the officers and is alleged to have occurred on the day of the arrest. In this connection it should be noted that the officers arrested both the appellant and the Chinese cook for possession of opium and yen shee. The Chinese cook was not made a party to this prosecution and on the trial the Chinese cook was called as a Government witness and denied, under oath, having made the statement attributed to him by the narcotic agents. Thus, we have a situation where the only evidence connecting appellant with the crime charged in the two counts of the San Francisco indictment is an alleged statement made by a third party at the time of the arrest of appellant, which alleged statement such third party denied under oath when called as a Government witness.

Where facts proven are as consistent with innocence as they are with guilt, the trial court should direct a verdict of not guilty.

*Romano v. United States*, 9 Fed. (2d) 522;  
*Parnell v. United States*, 64 Fed. (2d) 324.

In *Hammond v. United States*, 127 Fed. (2d) 752, the court held that *unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt*, it is the trial judge's duty to instruct the jury to acquit, and where all substantial evidence is as con-

sistent with innocence as with guilt, it is the duty of the Appellate Court to reverse the judgment of conviction.

The appellant raised the question of the sufficiency of the evidence by his motion for a directed verdict and by his motion in arrest of judgment.

*United States v. Fullerton*, Fed. Case No. 15,176, 6 Blanetf 177.

Also:

*Je hl v. United States*, 127 Fed. (2d) 585.

All of the acts of appellant, in and of themselves, are innocent acts and there is a complete lack of evidence to show any conduct on behalf of appellant with respect to either of the indictments which is not consistent with his innocence.

---

#### CONCLUSION.

We respectfully submit:

1. The evidence is wholly insufficient to support appellant's conviction on the third and fourth count of the indictment returned in the Southern Division of the Northern District;
2. The evidence is wholly insufficient to support appellant's conviction of the indictment returned in the Northern Division of the Northern District;
3. All of the conduct and acts of appellant, in each case, are as consistent with his innocence as with his guilt;

4. The judgment of conviction should be reversed as to all counts.

Dated, San Francisco, California,

March 27, 1944.

Respectfully submitted,

WALTER H. DUANE,

JAMES B. O'CONNOR,

*Attorneys for Appellant.*

